21 How 198
347
22 How 87
Dismissed for want of writ of error

SUPREME COURT OF THE UNITED STATES.

No. ~~179.~~ 105.

THE COUNTY OF WASHINGTON, PLAINTIFFS IN ERROR,

vs.

CLARK DURANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 179.

THE COUNTY OF WASHINGTON, PLAINTIFFS IN ERROR,

vs.

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1 Be it remembered, that at a term of the circuit court of the United States, holden at Des Moines, in the district of Iowa, on the second Tuesday, it being the twelfth day of May, A. D. 1863, the following among other proceedings were had—that is to say:

FRIDAY, *May* 22*d*, A. D. 1863.

CLARK DURANT,
v.
THE COUNTY OF WASHINGTON.

This cause now coming on to be heard, the plantiff, appears, by J. Grant, esq., his attorney, and the defendant, by Messrs. Noble & Strong, her attorneys; and thereupon the cause is submitted to the court upon the following agreed case, that is to say:

Be it remembered, that the parties hereto, the plaintiff, a citizen of the State of New York, and the defendant, a citizen of the State of Iowa, in order to simplify the pleadings in this cause, have made the following
2 agreed case, which is to be regarded by the court as a special verdict of a jury.

The plaintiff commenced an action at law to recover three instalments of interest on one hundred bonds of one thousand dollars each, with coupons, of which the following is a copy.

$1,000, No. 1.—*Copy of bond.*

UNITED STATES OF AMERICA, *State of Iowa:*

The county of Washington, for and in consideration of ten shares of one hundred dollars each of the capital stock of the Mississippi and Missouri Railroad Company, promises to pay to James Dawson, or bearer, the sum of one thousand dollars on the first day of July, A. D. 1878, with interest thereon at the rate of ten per cent. per annum, payable semi-annually, on the first day of January and the first day of July in each year, principal and interest payable at the Corn Exchange Bank, in the city of New York. And the faith of the said county of Washington is hereby pledged for the
3 semi-annual payment of the interest and the ultimate redemption of the principal.

I, S. P. Young, county judge of the county of Washington, do hereby certify, that by a vote of the legal electors of the said county, at an election held on the fifth day of April, 1858, in accordance with a proposition submitted to them according to the laws of the State, the county judge was authorized to subscribe one hundred thousand dollars to the capital stock of the Mississippi and Missouri Railroad Company, and issue county bonds to the same amount, payable in twenty years, and bearing interest at the rate of ten per cent. per annum, and that the above is one of one hundred bonds of one thousand dollars each, numbered from one to one hundred, given for said subscription.

[SEAL.] In testimony whereof, I have hereto set my hand and affixed the seal of the county this the first day of July, 1858.

S. P. YOUNG, *County Judge.*

Attest: ALBERT ALLEN, *County Clerk.*

4 *Copy of the coupons.*

The county of Washington, Iowa, will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of July, 1859, fifty dollars, for interest due on that day on bond No. 1.

$50. S. P. YOUNG, *Co. Judge.*

The county of Washington, Iowa, will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of January, 1860, fifty dollars, for interest due on that day on bond No 1.

$50. S. P. YOUNG, *Co. Judge.*

The county of Washington will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of July 1860, fifty dollars, for interest due that day on bond No. 1.

$. S. P. YOUNG, *Co. Judge.*

The plaintiff also brought said action at law to recover three instalments of interest on one hundred bonds of five hundred dollars each, of which the following is a copy, that is to say:

5 $500, No. 1.

UNITED STATES OF AMERICA,
State of Iowa:

The county of Washington, for and in consideration of five shares of one hundred dollars each of the (Mississippi and Missouri railroad) capital stock of the Mississippi and Missouri Railroad Company, promises to pay James Dawson, or bearer, the sum of five hundred dollars on the first day of July, 1878, with interest thereon at the rate of ten per cent. per annum, payable semi-annually, on the first day of January and the first day of July in each year, principal and interest payable at the Corn Exchange Bank, in the city of New York. And the faith of said county of Washington is hereby pledged for the semi-annual payment of interest and the ultimate redemption of the principal.

I, S. P. Young, county judge of the county of Washington, do hereby certify, that by a vote of the legal electors of said county, at an election held on the seventh day of August, 1854, in accordance with a proposition submitted to them according to the laws of the State, the county judge
6 of Washington county was authorized to subscribe fifty thousand dollars to the capital stock of the Mississippi and Missouri Railroad Company, and issue county bonds to the same amount, payable in twenty years, and bearing interest at the rate of ten per cent. per annum, and that the above is one of one hundred bonds of five hundred dollars each, numbered from one to one hundred, given for said subscription.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed the seal of the county this first day of July, 1858.

S. P. YOUNG, *County Judge.*

Attest: ALBERT ALLEN, *County Clerk.*

Copy of the coupons.

The county of Washington, Iowa, will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of July, 1859, twenty-five dollars, for interest due that day on bond No. 1.

$25. S. P. YOUNG, *Co. Judge.*

7 The county of Washington, Iowa, will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of January, 1860, twenty-five dollars, for interest due that day on bond No. 1.

$25. S. P. YOUNG, *Co. Judge.*

The county of Washington, Iowa, will pay the bearer, at the Corn Exchange Bank, in the city of New York, on the first day of July, 1860, twenty-five dollars, for interest due that day on bond No. 1.

$25. S. P. YOUNG, *Co. Judge.*

The bonds of each class are all alike, and numbered consecutively from one to one hundred.

The instalments of interest for which the suit is brought are those which fell due on the first day of July, 1859, January, 1860, and July, 1860.

Attached to each bond were forty coupons, but copies only of those on which the suit is brought are here set out.

These bonds were issued, as they purport on their face, for subscrip-
8 tions to stock in the Mississippi and Missouri Railroad Company, in pursuance of votes of the people of said county, and were delivered in June, 1858, by the county judge of said county to the agent of said railroad company, who at the same time gave to the said county judge a certificate of stock of said railroad, to the amount of said bonds.

The said railroad company is a corporation created under the general laws of Iowa to build a railroad from Davenport, in Scott county, on the Mississippi river, westward through the counties of Scott, Muscatine, Washington and other counties, to Council Bluffs, on the Missouri river, and is completed and in operation from said Davenport to the town of Washington, and no farther; which town of Washington is about the geographical centre centre of said Washington county.

The plantiff is a holder of said bonds as a purchaser in the open market for a valuable consideration, and is a holder for value prior to January
9 first, 1859, claiming in good faith.

The defendant pleaded a general denial of all allegations in plaintiff's petition, with leave to offer in evidence any matter of fact, and to insist on any matter of law which could be regarded by the court or a jury as a bar to the plaintiff's recovery.

The defendant pleaded specially, as to the $50,000 subscription and issue of bonds, that no legal vote had ever been taken by the people of said county of Washington, upon the proposition to make said subscription;

That said railroad had not been built as agreed, and insisted that there was no law of the State of Iowa authorizing the issue of said bonds;

That the constitution of the State of Iowa prohibited the legislature from enacting a law to authorize the issuing of said bonds, and that therefore they were, and are, unconstitutional.

10 That the constitution of the State of Iowa prohibited the State from incurring a debt of over one hundred thousand dollars, ($100,000,) which defendant insisted she had incurred, and did owe at the time said bonds were issued.

The following is a copy of the record of all the proceedings connected with, or pertaining to, the issue of the five hundred dollar bonds, or the subscription to the stock of the railroad to which they were issued—that is to say:

Railroad Proclamation.

STATE OF IOWA,
Washington County:

To the voters of said county:

Whereas the county court of said county has been petitioned by several hundred voters of said county, asking said court to order a special election

for the purpose of rescinding fifty thousand dollars of the stock voted
11 to the Philadelphia, Fort Wayne and Platte River Air-line railroad, at the special election held in said county in November, 1853, and subscribe the same to the Mississippi and Missouri railroad:

Therefore it is hereby ordered by the county court of said county, that there be a special election held in said county, at the usual places of holding elections in the several townships in said county, on Monday, the seventh day of August, 1854, for the purpose of taking a vote for and against the following propositions, to wit:

That said Washington county will rescind fifty thousand dollars of the stock voted to the Philadelphia, Fort Wayne, and Platte River Air-line railroad, at the special election held in November, 1853, and that said Washington county will subscribe said fifty thousand dollars stock, when so rescinded, to the Mississippi and Missouri railroad; and that there be county bonds issued therefor, bearing interest at a rate not greater than ten per
12 cent. per annum, and payable in twenty years from date; and that there be a tax of five mills on the dollar, if necessary, levied on the taxable property of said county from year to year, for the purpose of paying the interest on said bonds annually; and after the expiration of fifteen years, the rate of tax to be so increased as not to exceed one per cent. on the dollar, if necessary, for the purpose of paying off said bonds; and said rate of tax to be continued until said bonds with the interest thereon is all paid, unless said bonds be all disposed of; and that said bonds shall not be issued except said Mississippi and Missouri Railroad Company receive said bonds at their par value in payment of stock in said railroad, and then only as fast as the work progresses toward completion within the limits of said county.

The election will be governed by the election laws contained in the code of Iowa; and the manner of voting on said propositions shall be by
13 ballot, and those in favor of said propositions shall write or print on their ballots, for stock tax and rescinding; and those opposed shall write or print on their ballots, against stock tax and rescinding; and if a majority of the votes cast at said election be in favor of said propositions, the same shall be considered as adopted, and the county judge of said county authorized to subscribe said stock and issue said bonds. And it is further ordered that the foregoing propositions be published in the Washington Argust for four weeks in succession before said election, and that there be a copy of said propositions posted up at the place of voting in each township, during the day of election.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed the seal of said county at Washington, this 30th day of June, 1854.

ENOCH ROSS,
County Judge of said county.

I, Enoch Ross, county judge for said Washington county, being
14 satisfied that the preliminary notice required by the 115th section of the code of Iowa has been fully and substantially complied with

and there being a majority of two hundred and ninety votes in favor of said propositions, which is as follows, to wit:

Against stock tax and rescinding.	Stock tax and rescinding.	
7	208	Washington.
..	57	Oregon.
..	8	Highland.
63	11	Iowa.
89	39	English river.
76	12	Lime creek.
14	22	Jackson.
..	47	Cedar.
..	74	Dutch creek.
55	18	Clay.
..	54	Franklin.
96	32	Brighton.
..	75	Marion.
..	33	Crawford.
400	690	Total.

Therefore said propositions are hereby declared to be adopted, and
15 it is hereby ordered that the following notice be published for four weeks in succession in the Washington Argus, to wit:

STATE OF IOWA,
Washington County, ss:

To the voters of said county, greeting:

You are hereby notified that the propositions to rescind fifty thousand dollars of the railroad stock, voted to the Philadelphia, Fort Wayne, and Platte River Air-line railroad, at the special election in November, 1853, and subscribe the same to the Mississippi and Missouri railroad, and issue bonds therefor, &c., have been adopted by a majority of two hundred and ninety votes.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of said county at Washington, this 29th day of August, 1854.

ENOCH ROSS, *County Judge.*

I, L. F Walden, do hereby solemnly swear that I published a notice
16 of the result of the foregoing election, to rescind and take railroad stock as stated above, four weeks in succession in the Washington Argus, a weekly newspaper published in the county of Washington, State of Iowa.

LEWIS F. WALDEN.

Subscribed and sworn to before me, this 3d day of October, 1854.

ENOCH ROSS, *County Judge.*

STATE OF IOWA,
Washington County, ss:

I, Ralph Dewey, clerk of the county court in and for said county, do hereby certify that the foregoing is a full, true and perfect copy of the record entries in the foregoing entitled cause as the same appear of record in the office of the county judge of said county.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county at Washington, this 11th day of September, A. D. 1860.
[SEAL.]

RALPH DEWEY, *Co. Clerk.*

17 It is agreed that the said railroad has been built and constructed from Davenport, in Scott county, Iowa, on the Mississippi river, westward to the town of Washington, which is the county seat and about the geographical centre of Washington county, and no farther.

The following are all of the statutes of Iowa which authorize the issue or execution of said bonds, viz: chapter 15 of the code of Iowa of 1851; chapter 128 of the laws of Iowa, approved January 25th, 1855, entitled "An act regulating the interest on city and county bonds;" chapter 149 of the said last-named laws, entitled "An act regulating the issue of county and corporate bonds."

It is agreed that these laws and the constitution of the State of Iowa, in force when said bonds were issued, are to be considered in evidence before this and the appellate court, and shall be read to and considered by
18 said courts the same as if the said laws and constitution were set out here in full and at length.

It is agreed that at the date of these bonds, and at the date of the act of 1855, above referred to, the State of Iowa had incurred and owed a public debt of one hundred thousand dollars.

Upon the foregoing facts the law of the case is submitted to the court.

If the court shall be of opinion, upon the law applicable to the above statement of facts, that the plaintiff is entitled to recover, then there is to be judgment for the plaintiff for the sum of twenty-five thousand and five hundred and thirty-seven dollars and fifty cents, with interest at ten per cent. from the 22d day of March, 1862, amounting in all to the sum of twenty-eight thousand and five hundred and sixteen dollars and eighty-seven cents, ($28,516 87.)

If the court shall be of opinion that the plaintiff is not entitled to recover, then there is to be judgment for the defendant for costs.

It is also agreed that this statement of facts is to stand in the place of the declaration, demurrer, plea and issue in the case; and that the party against whom the judgment shall be rendered in this court shall
19 have the right to appeal to the Supreme Court of the United States, in the same manner and to the same extent as upon formal pleadings, trial by jury, judgment and bill of exceptions.

The said appeal is to be taken to the Supreme Court of the United States, and shall operate as a stay of execution without any other bond than the bond for costs, required in the Supreme Court of the United States, and either party shall have the same right to any and all exceptions, and to make any and all objections to the validity of said bonds as if upon formal pleadings and exceptions taken.

The appellee agrees to appear in the United States Supreme Court, without a citation for that purpose.

And the said cause now coming on for hearing, and the arguments of counsel being heard, it is considered by the court, in view of the facts agreed

upon as a special verdict, that the law of the case is with the plaintiff;
20 and the court doth order and adjudge that the plaintiff have and recover from the defendant the sum of twenty-five thousand and five hundred and thirty-seven dollars and fifty cents, ($25,537 50,) together with the costs of this suit, taxed at $44 00, and that he have execution therefor.

And thereupon the defendant prayed for a writ of error, which is allowed her; and by agreement of counsel the issuance of said writ and the citation, and the filing a bond other than the bond for costs in the Supreme Court is waived; and the plaintiff agreed to appear in the appellate court without further notice; and execution is stayed until the cause is decided in the Supreme Court of the United States.

21 I, William G. Woodward, clerk of the circuit court of the United States, in and for the district of Iowa, hereby certify that the foregoing twenty pages of writing are a full, true and complete copy of the record and proceedings in the above-named cause in the court therein named, as the same now remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of [SEAL.] the said circuit court, at Des Moines, this 8th day of July, A. D. 1863.

W. G. WOODWARD, *Clerk as aforesaid.*

Filed December 10, 1863.

SUPREME COURT

OF THE

UNITED STATES.

THE COUNTY OF WASHINGTON, PLAINTIFF IN ERROR,
versus
CLARK DURANT, DEFENDANT IN ERROR.

ACTION AT LAW.

WRIT OF ERROR FROM THE DISTRICT OF IOWA.

Argument for Defendant in Error.

DAVENPORT, IOWA:
RICHARDSON, WEST & CO., BOOK AND JOB PRINTERS.
1862.

Supreme Court of the United States.

THE COUNTY OF WASHINGTON,
PLAINTIFF IN ERROR,
versus
CLARK DURANT,
DEFENDANT IN ERROR.

Writ of Error from the District of Iowa.

ARGUMENT FOR DEFENDANT IN ERROR.

CASE.

The county of Washington issued its bonds in due form, to assist in building a railroad to and through the county. These bonds, payable to bearer, became the property of the plaintiff, as a *bona fide* purchaser, and he brought suit in the Court below to recover the interest upon them.

The following is a copy of one of the bonds sued upon:

$500. No. 93.

UNITED STATES OF AMERICA. STATE OF IOWA.

COUNTY OF WASHINGTON.

The County of Washington, for and in consideration of Five Shares, of One Hundred Dollars each, of the Capital Stock of the Mississippi and Missouri Railroad Company, promise to pay James Dawson, or bearer, the sum of Five Hundred Dollars, on the first day of July, 1878, with interest thereon, at the rate of ten per cent. per annum, payable semi-annually on the first day of January and first day of July in each year; principal and interest

payable at the *Corn Exchange Bank*, in the city of *New York*. And the faith of the said county of Washington is hereby pledged for the semi-annual payments of interest and the ultimate redemption of the principal.

I, S. P. Young, County Judge of the County of Washington, do hereby certify that by a vote of the legal electors of said county, at an election held on the seventh day of August, 1854, in accordance with a proposition submitted to them, according to the laws of the State, the County Judge of Washington County was authorized to subscribe Fifty Thousand Dollars to the Capital Stock of the Mississippi and Missouri Railroad Company, and issue County Bonds to the same amount, payable in twenty years, and bearing interest at the rate of ten per cent. per annum; and that the above is one of one hundred Bonds of Five Hundred Dollars each, numbered from One to One Hundred, given for said subscription.

Seal of the County of Washington.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County, this First day of July, 1858.

[Signed,] S. P. YOUNG, County Judge.

Attest: ALBERT ALLEN, County Clerk.

The following is a copy of a coupon:

THE COUNTY OF WASHINGTON, IOWA,

Will pay the bearer, at the Corn Exchange Bank, in the City of New York, on the first day of January, 1861, Twenty-five Dollars, for interest due that day on Bond No. 93.

$25. [Signed,] S. P. YOUNG,
County Judge.

The bonds are of two issues—one class for one thousand dollars each, and one class for five hundred each. No question was made in the court below as to the form of vote or issue on the thousand dollar bonds. A question was made as to the form of the vote on the five hundred dollar bonds. The Court below held that the recital of the bond was conclusive as to the regularity of the issue in complying with the forms of the Statute, as had been held by this court. The foregoing is a copy of the latter class of bonds.

ARGUMENT.

There is really but a single question before this Court:

1st. Has the Legislature of Iowa the constitutional power to authorize the county to issue these bonds?

2d. Has that power been pursued?

Upon the second point there is probably no serious question. Perhaps a point may be made, that two questions were submitted to the people on the issue of bonds for $50,000, which are of $500 each, but it really cannot be serious; because there was really but one question—whether the County of Washington would change a subscription of $50,000.00 from one road to another. In this Court, the recital of the bonds that the statute was duly followed is entirely conclusive upon the plaintiffs in error, and the question is not open to inquiry.

See Aspinwall vs. Knox Co., Com. 21 Howard, 539.

The only real issue before this Court is this:

Has the Legislature of Iowa the constitutional power to authorize counties and cities to issue bonds to aid in assisting in building railroads to or through them?

HISTORY OF THE LEGISLATION AND JUDICIAL OPINIONS OF THE SUPREME COURT OF IOWA ON THIS QUESTION.

In the year 1851, the first Code of Laws of the State of Iowa went into effect. Section 114 of that Code authorized the County Judge to submit to the people, at a regular or special election, the question of borrowing money to build, or assist in building, any road or bridge. The charters of the various cities in the State, and the general provisions of the Code, Section 670, authorize the Corporations to borrow money for any public purpose, after a proper vote of the people, and in some cases special laws were passed, to permit money to be raised for such purposes.

The Supreme Court of the State, in the year 1853, in the case of *Dubuque County* v. *Dubuque & Pa. R. R. Company*, held

that a county had the constitutional right to aid in building a railroad within its limits, and that the section 114 of the Code applied to the railroad. *Dubuque County* v. *D. & P. R. R. Co.*, 4 Greene, Iowa R. 1. *State* v. *Bissell*, 4 Greene, Iowa R. 328. The General Assembly of the State, by an act of the 25th of January, 1855 (see Acts 1854–5, page 192), provided: "Section 2. That whenever any railway company shall have received, or may hereafter receive, the bonds of any city or county, upon subscription to stock, by such city or county, such bonds may bear interest at any rate not exceeding ten per cent., and may be sold by such railway company at a discount. Sec. 3. The provisions of the Act should apply to any railroad bonds, as well heretofore as hereafter issued." The same Legislature (see Acts 1854, page 219,) provided "that in all cases where counties, cities, or town incorporations, had, or might thereafter become stockholders in railroads, or other private corporations, it should not be lawful for the County Judge, or proper officers, to issue such bonds until he was satisfied that the road would be built in thirty-six months from the delivery of the bonds, and that no previous contract should be affected by that Act." Copies of all these laws are hereto annexed.

In the year 1857, the Supreme Court held that whatever might have been their opinions, were it a *res nova*, the authority of counties to subscribe stock in railroads was not an open question, having been already decided, and the decision would be adhered to. And the *bona fide* holder of such bonds would be protected in enforcing their collection. Clapp v. Cedar County, 3 (Clark) Iowa, 15. In 1858 the Supreme Court adhered to this decision, and said that subject would not again be discussed. Ring v. Johnson County, 6 (Clark) Iowa, 265. At the same term, the Court held that an Act to legalize a subscription which did not comply with the forms of the State was constitutional. "That the power to subscribe stock in railroads having been conferred upon the counties, any defect in the exercise of the power might be aided by a curative Act." McMillen v. Boyles, 6 (Clark) Iowa, 304. At the same term Wright, Justice, who had dissented

from the prior judgment, said, in delivering the opinion of the Court, "While I have never concurred in this ruling, and still deny the power, yet now it may, as I suppose, be considered settled." McMillen v. County Judge, Boyles, 6 (Clark) Iowa, 391. And in 1859 Wright, Justice, held "that the question of the power of the County Judge to submit such questions had been settled in favor of such power; referring to Clapp v. Cedar Co., Ring v. Johnson Co., McMillen v. Boyles." Games v. Robb, 8 Iowa, 199. This power had been exercised to such an extent that several millions of dollars were issued at the time of the adoption of the new Constitution—1857. The debates in the Convention show that the exercise of the power, under the pressure of popular clamor, had become alarming, and a clause was inserted in the Constitution, which not only legalized those bonds which had been issued, but restrained the issue beyond a certain amount. The third Section of the eleventh Article of the Constitution of Iowa, provided that "no municipal corporation should be allowed to become indebted, in any manner, to an amount in the aggregate" that is added to what was already created, exceeding five per cent. on the taxable value of the county.

The same Constitution provided, also, Sec. 4 of Article 8, that no political or municipal corporation should become a stockholder in a bank; thereby admitting legislative power in relation to other corporations.

In the year 1859, the Supreme Court held that Section 114 of the Code was not intended to apply to railroads, and when the issue of bonds was attacked, before they reached the hands of *bona fide* holders, that their issue would be enjoined. Stokes v. Scott Co., 10 Withrow's Iowa R., 166.

At the same time, and in the same term, the Court held that where the bonds had passed into the hands of *bona fide* holders, they were valid and binding. Stokes v. Scott Co., 10 Iowa, 166. Whitaker v. Johnson Co., 10 Iowa, 161. If ever a question ought to be considered as settled, one would think that this question was settled by the judicial mind of Iowa. A change in the rule of law now, would present a judicial, not legislative, repudiation

of contracts, never permitted on this continent, and to honest men, outside of the repudiating State, the appearance of having made the judgment in the first place, to obtain credit, for the sale of such bonds, and as soon as no more could be sold, repudiating the judicial opinions which gave them credit.

Since writing this last paragraph, the Supreme Court of Iowa has, in the case of the State *ex rel.* B. & M. R. R. Co., v. The County of Wapello, reversed all the foregoing decisions, and held that the Legislature of Iowa has no power, under the Constitution, to authorize counties to issue bonds to pay for stock in railroads.

The decision will be in the 13th vol. of Iowa Reports, and can be examined by this Court before this cause is disposed of.

If we can gather from the great volume of matter in the opinion, what were the real grounds of reversal of the former decisions, they were these:

1. That a railroad is a private, not a public corporation, and where it is created by general not a special law, it is essentially private, not public, or mere extended partnership.

2. That a county or town cannot issue its bonds to aid in building a railroad, and the Legislature cannot confer upon it the power to do so; and that proves "the power to be preternatural, and when the Legislature confers upon a county the right to levy taxes to pay such bonds, the tax, instead of being a part of the county revenue, goes into the treasury of a private railroad company, and is controlled and paid out by such company, and to call the money a county tax is simply a solecism in language."

3. That a county, by becoming a stockholder in a railroad, embarks itself and all its citizens in the business of common carriers, with all its stern and extraordinary liabilities.

4. That the clause in the Constitution of Iowa, "This enumeration of rights shall not be construed to impair or deny others retained by the people," is peculiar to the Iowa Constitution, and that instrument is written upon an entirely different theory from the other State Constitutions.

Nota Bene.—It so happens that the writer of this argument placed that clause in the Iowa bill of rights, and he knows that he copied its substance and precise words from the Constitutions of some dozen other States, and must be permitted to deny its originality. It was copied from the Constitution of the State of Ohio, and has not been construed in that State to deprive the Legislature of Ohio of the power herein denied.

5. The Judge who delivered the opinion, assigns as a reason influencing himself, but not as the judgment of the Court, that that clause in the Constitution of Iowa which prohibited a State debt above a certain sum without a vote of the people, was intended to apply to a county or city debt.

It was fortunate for us that the Judge who delivered the opinion did not announce this as the opinion of the Court.

The Supreme Court of Iowa had formerly held, Dubuque Co. v. Dubuque and Pacific R. R. Co., 4 Greene, Iowa 1, that this prohibition upon State debts did not apply to county debts, and if the Judge who pronounced this opinion had announced it as the decision of the Court, he would have reversed the decisions of the Supreme Court of Iowa on three questions in one opinion.

In the opinion under review, the Court say, that running a railway through a street subjects it to a new servitude, for which the owner is entitled to compensation; and yet in Millburn v. Cedar Rapids, &c., 12 Iowa, 246, 260, the same Judge held that it was not a new servitude, and the party was not entitled to compensation therefor.

It is a part of the history of the State of Iowa, that the Judge who pronounced the opinion of the Court in The State v. Wapello County, was once the President of a railroad company, and that when the question of a railroad subscription was before the people of the county in which he resides, Lee county, (see McMillan v. Boyles,) he publicly advocated the very opinions which he now repudiates; and in making this statement we mean no disrespect to an excellent man, but the influence of popular clamor now is not less than it was with the Athenians, and as the Judges of State courts elected by the people carry with them,

without being conscious of it, the commands of the multitude, it is fortunate for us that this Court has enough of courage to correct the vagaries of judicial tribunals who regard the voice of the people as the voice of God.

THE IOWA STATE CONSTITUTION.

It suits the order of our discussion to dispel a technicality which has recently been raised on this subject, and against our views of constitutional law, which is this: that a railroad, the stock and emoluments of which go into the pockets of individuals, is not public, or carried on for a public purpose.

That such a railroad is intended for the public, and in its uses and objects is public, is laid down in the elementary law books as a first principle. 2 Kent, 310, and cases cited.

A railroad company is a private corporation, its outlays and emoluments being private property; but the road constructed by them is a public highway, and they may, under the sanction of the Legislature, take, upon giving compensation, private property for the use of the company, as being for a public use. Raleigh & Gaston R. R. Co. v. Davis, 2 Devereux & Battle's Law R., 451. The Court said: "It is true that this is a private corporation, but it is constructed to effect a public benefit, by means of a road, and that is *publici juris*. The public interest and control are neither lost nor destroyed." R. & G. R. R. Co. v. Davis, 2 Devereux & Battle, 468, 469. Authorities on this point are so numerous that it is a waste of words to cite them.

The government of Iowa is not one of special delegated powers. It begins: "We, the people, do establish a free government." See Constitution in Code of 1851.

"The legislative authority," Article 3, Section 1, "shall be vested in a Senate and House of Representatives."

The legislative power can do everything which is not prohibited by the Constitution.

"The political power is transferred by the Constitution from the people to the government. The government of the United States is an exception to this principle, from its peculiar construction."

Raleigh & Gaston R. R. Co. v. Davis, 2 Devereux & Battle, 456.

There is nothing peculiar in the State Constitution of Iowa. It has not in it any such clause as the Constitutions of Tennessee and Florida, limiting the right of the Legislature to taxing counties and cities for municipal purposes.

THE QUESTION IN OTHER STATES.

Under the Federal Constitution, which is a government of limited powers, created by a compact of States, all powers are to be considered prohibited, which are not expressly or incidentally conferred.

Under the State Constitutions, all legislative powers were conferred on the General Assembly, which were not expressly or incidentally prohibited.

In the State constitutions, power is conferred in general terms, and then specific prohibitions are inserted, with respect to powers intended to be prohibited. In other words, the theory of the State Constitutions is, that the *grant* of power is general, the *prohibition* special. In the Federal Constitution, the reverse. Walker's American Law, 76; People ex rel Wood v. Draper, 15 New York Appeals, 543. Sawyer vs. Alton, 3 Scam. 130; Mason vs. Hart, 4 Scam., 134. This principle is repeatedly recognized in the various cases, in which the subject under discussion has been decided in the State courts.

The earliest and simplest exercise of the power conferred by the legislature on municipal Corporations, in building common roads, wharfs, docks, &c., was never questioned. It was only when the principle was applied to new subjects, as Railroads, canals, slackwater navigation, when the projected improvements were vast, and the danger to abuse great, and the anticipated advantages were not realized, that the power was denied.

This contest, so far as Iowa is concerned, comes too late. The Constitution of Iowa was adopted long after the judicial interpretation of other States had been placed upon the legislative power in this respect, and the interpretation already made is to be followed in Iowa. Sedgwick Stat. & Con. Law, 254.

We cannot see the force of the argument, that the object and design of these avenues to commerce are not a part of the objects for which municipal Corporations are created.

"The earliest object of municipal Corporations, was the encouragement of commerce." Wilcox Municipal Corporations, 17.

The assumed position that municipal Corporations have no other natural power or objects, than merely governing themselves, is not true. That object was secondary in their creation, and so far as cities are concerned, it is secondary now. Commerce, trade, facilities for intercourse, created London, Paris, Amsterdam, Liverpool, New York.

One of the earliest adjudicated cases, upon the powers of the legislature to confer this authority on municipal Corporations was in Virginia, in 1858. Goddin v. Crump, 8 Leigh R. 120. The legislature authorized the city of Richmond to subscribe to the stock of the James River and Kenawha Company; which, among other things was authorized to remove a bar in the James River, just below and outside, the corporation limits of the city of Richmond. The Court, Tucker, Cable and Brockenbrough (Brook dissenting) held such a law, to be constitutional.

"It has been argued," says the court, "that the corporate powers must be confined to the limits of the Corporation. This is an imperfect test. It is not to be denied, that a Corporation may bring water into the city from a point beyond it, and it may erect its works for that purpose without its jurisdiction. The interest of the Corporation is the true test of the corporate character of the Act. The benefit is experienced within the limits, though the operation by which it was done was carried on without. So the removal of the bar in James River above mentioned, would be fairly a corporate Act, since it would greatly redound to the advantage of Richmond; it would benefit its trade, and though the work be done beyond its limits the effect would be felt in the city.

If, then, the probable benefit to the community is the test of the corporate character of the act, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Not this court, but the majority of this Corporation, acting under legislative sanction." Goddin v. Crump, 8 Leigh 120.

In 1846 this decision was followed, and an Act requiring the county court to levy a tax in the county for the purpose of improving the navigation of a creek lying within it, though passed without the assent of the people, was held to be constitutional. Harrison Justices, v. Holland, 3 Grattan R. 247,

One of the next earliest and most important cases was decided in Connecticut, in 1843. Church who delivered the unanimous opinion of the Court, examined all the objections interposed to the legislative power in such cases; he says: "It should be borne in mind that it was neither the declared nor actual purpose of the city to deal in stocks, but to aid in the construction of what was believed to be a great public improvement, which would result in direct benefit to the city, in bringing to it the trade of the interior. A subscription to the stock was the only practical means to accomplish that end. Being a stockholder is the incidental result of bringing trade to the city."

"The strongest argument against it is that it is unjust to tax a community against their will, for such a purpose. The objection is not only too broad, but too late. It would lie with equal reason against every act of the legislature, creating a public municipal corporation, in opposition to the will of any who would be made subject to its action. It is a fundamental principle of all our popular institutions, both sovereign and corporate, that majorities must govern, and minorities must submit in every case, where constitutional or corporate powers are not transcended.

The practical effect of which is not only often injurious to majorities themselves, but unjust to others; but this consequence is only the less evil, and the price paid for the greater good. If minorities exist, the acts of majorities are of necessity opposed to what they believe to be their interests. The levying and collecting of taxes is always a compulsory act of the majority, and generally very ungraciously submitted to by the minority. The present case is not unlike others in that respect. The minorities have had frequent opportunities of being heard, as well by the legislature as the courts.

But if there be injustice by the legislature or the city, by holding such proceedings void, we transfer the burden of injustice from the citizens of Bridgeport, who would gladly avail themselves of the good result, to third persons, who have confided in the good faith of such citizens.

We are referred to no prohibitory power in the Constitution, except that clause which says that private property cannot be taken for public use without compensation. This Act confers no such power, that did not exist in the original charter. The power to tax is extended to new subjects, and taxes may be increased, and in this way, indirectly, property is taken for public use; but this does not fall within the constitutional prohibition; if it did, all municipal governments, conferring the power of taxation would be void. Bridgeport v. The Housatonic R. R. Co., 15 Con. 475.

The question was first settled in Tennessee, in 1848. It was first raised under an act authorizing the city of Nashville to take stock in the Nashville and Chattanooga Railroad, leading from Nashville to the Tennessee river. It was decided before any bonds were issued. Turley, Judge, delivered the unanimous opinion of the Court:

"The Constitution of Tennessee authorized the Legislature to grant to counties and towns, the right to impose taxes for county and corporation purposes. Is the making of a road from Nashville to Chattanooga a corporate purpose of the town of Nashville? Such purposes, difficult to define, may be as diversified as may be found requisite, by experience, to promote the health, comfort and prosperity of the corporators, and anything which promotes these things is, or may be, constituted a legitimate corporate purpose.

Corporate purposes may be classed into direct or indirect. Direct, such as police regulations, opening and preserving streets, erection of market houses, hospitals and water works. Indirect corporate purposes may be styled such as operate in a more remote degree, and which must be traced to their source before they can be comprehended. Canals, roads, improvements of rivers, by which the commerce of a town is extended. The improvements claimed to be for a corporate purpose, must have such connection with the town as to be the medium by which its prosperity is attained. It must begin or terminate at or so near the town as to be capable of affecting its direct interests. It is not to be denied, that a corporation is deeply interested in the making of any road whereby its means of commerce are increased. And if so, why shall it not be a corporate purpose to have it made?

A town is ten miles from a navigable stream. It is obvious that it must be of great importance to the town, its commerce and general prosperity, to have a rail or other road to the river. It concerns no one else but the town, and no one else will make it. Shall it not become a corporation purpose of the town to make it, if it be able? Distance cannot change the principle, and it may make it, ten or any number of miles, there being no limit, save the ability of the corporation and discretion of the Legislature. We are not able to see why it is not just as much a corporate purpose as building a road from the square to the water works above the town. The only distinction is, that one is longer and will cost more money than the other; but this, as to principle, is a distinction, not a difference." Nichols et al. v. Mayor of Nashville, 9 Humphrey, 252.

So, after an elaborate argument, in 1854, the same Court held: "The construction of a railroad through a county or municipal corporation, is a county or corporate purpose under the Constitution of Tennessee." L. & N. R. R. v. Davidson, 1 Sneed R., 637.

In Florida (1855), it was held, that "subscriptions to the stock of a railroad running through a county, was one of the powers which the Legislature could confer upon a county, under that clause in the Constitution of Florida, which limited the power of the Legislature to authorize counties and incorporated towns to impose taxes for county and corporation purposes. Cotton v. Com. of Leon, 6 Florida, 610.

The argument in the Courts of these States is very able, and the force of the decisions great, as there was, in these two States, Constitutional limitations of power in the Legislature, which exist nowhere else except in the new Constitution of the State of Iowa, where it relates to amount of debt.

In Kentucky, the question was first decided in 1847, under an act of the Legislature which authorized the city of Louisville to take stock and levy taxes to assist in building a railroad from Louisville to Frankfort.

The Court, without dissent, held, "That the Legislature had the Constitutional power to grant to cities and towns the power

to levy taxes for works of internal improvement, for facilitating access to or from the town or city. That a railroad to a city is such a work; that it is within the scope of the corporate powers of a city, though not consented to by each individual to be affected thereby. The safety of the individual consists in the limit to the power of taxation imposed by the Legislature upon the local government, and the common interest and common judgment of the corporators, or their local representatives." Talbot v. Dent, 9 B. Monroe, 526.

The same doctrine was taken for granted in relation to turnpike roads, in 1850. Clarke v. P. U. & R. R., 12 B. Monroe, 143.

The principle was re-examined in Kentucky in 1852. The Court, Marshal, J., held:

"All the legislative power of the State was vested by the Constitution in the legislative department, subject to no restraints except such as were imposed by the Constitution itself, and the Constitution of the United States.

"All power is subject to abuse. A demonstration of the evil consequences to fear from the abuse of a particular power, does not demonstrate the non-existence of the power." Page 15. "The power of the Legislature to impose local taxation for the accomplishment of local purposes, cannot be denied. It is deducible from the general powers of the government, and cannot be exercised without legislative consent."

Hise, the dissenting Judge, bases his opinion on the injustice of the majority to tax the minority without their consent, not upon any express clause in the Constitution. He indulges in epithets of robbery, &c., but he points to no clause in the Constitution denying the power or showing its non-existence. Slack v. Maysville & Lex. R. R., 13 B. Monroe, 1.

The Supreme Court of Kentucky have reiterated this principle, in ordering a compulsory levy of a tax. Maddox v. Graham & Knox, 2 Metcalf's R., 56.

In 1849, the Supreme Court of Illinois held, that "the Legislature might levy a tax on the town of Rockford to build and repair a bridge across Rock River, built by private subscription. It

will hardly be denied that the Legislature may impose a tax upon a town or city to build a bridge or repair a road." Shaw v. Dennis, 5 Gilman R., 405. Also, Ryder v. Alton & C. R. R. Co., 13 Ills. R., 576.

So in 1858, the Supreme Court of Illinois held, that the "Legislature has the Constitutional right to authorize counties and cities to aid in the construction of railroads, by lending their credit or by taking stock."

"The clause in the Constitution which prohibits the credit of the State to corporations, does not apply to counties or cities." Prettyman v. Supervisors of Tazewell Co., 19 Ills., 406, 411.

In 1860, the same Court held the same principle, and re-examined the question in its legal and moral aspects. Johnson v. Stark Co., 24 Ills., 75.

The Supreme Court of New York, in 1840, held that the Legislature had a right to levy a tax on the citizens of Utica, for the expenses of changing the terminus of the Chenango canal from Whitesboro to Utica, though the State held the bonds of certain citizens to pay for it. It was contended that the act took private property for public use without compensation. The Court said, that cannot be so; if a man must be benefitted by every tax imposed on him, how could a lunatic asylum be built? The power of taxation may be abused, but its exercise cannot be judicially restrained so long as it is referable to the taxing power. Thomas v. Leland, 24 Wendell R., 65.

In People v. Mayor of Brooklyn, the Court of Appeals held, "There never was any just foundation for saying that local taxation must necessarily be limited by or co-extensive with any previously established district. It is said that the benefits to be derived from grading and paving a street are sometimes fanciful and imaginary, but this is to be addressed to the Legislature, not the Judges. The power to tax implies the power to apportion the tax as the Legislature may see fit, and that power has no limit where there is no Constitutional restraint." People v. Mayor of Brooklyn, 4 Comstock R., 419.

In 1857, the Supreme Court of New York held, "The act of

the Legislature, authorizing towns to borrow money and subscribe for stock in a railroad, to aid in building the same, is not repugnant to any express or implied provision of the Constitution. The power exercised was within the general grant of legislative authority, and the act valid and binding.

It does not deprive any citizen of his property, nor take private property for public use, within the meaning of the Constitution. Grant v. Courter, 24 Barbour R., 232.

In the same year, the Supreme Court held: "The entire legislative power, subject to the restrictions named in the Constitution, is vested in the Legislature.

The power to authorize the construction of works of internal improvement rests with the Legislature.

Such works may be constructed by general taxation, and in case of local works, by local taxation, or the State may aid in their construction by becoming a stockholder in private corporations, or authorize municipal corporations to become stockholders for that purpose.

Railroads are public works, and may be constructed by the State or corporations.

The Legislature is the exclusive judge, in respect to what works are for the public benefit, and in regard to the mode of their construction. Clarke v. City of Rochester; 24 Barbour R., 446.

The N. Y. Court of Appeals, in 1858, held: "The Constitution does not in terms, or by necessary intendment, restrain the Legislature from conferring upon municipal authorities power to subscribe to the stock of a railroad corporation, and raise funds for that purpose. Whether, in any instance, the power of a municipal corporation to tax is sufficiently restricted, to borrow money, to contract debts, or loan its credit, has been sufficiently restricted, is a question of legislation not reviewable in this Court." Bank of Rome v. Village of Rome, 18 N. Y. Appeals R., 32.

This question was decided in Pennsylvania in 1849. The Supreme Court held: "It is Constitutional to authorize the levy of a tax by a town to assist in building a turnpike road. From the commencement of the government, the Legislature has exercised the unchallenged power to levy taxes for every purpose deemed

by them legitimate. The construction of roads has ever been deemed of the first importance. Without them, a commercial community could not exist. The only difference between turnpikes (or railroads) and a common road is, that the former are most beneficial." Com. ex rel. Dysart v. McWilliams, 11 Pa. State, 61.

This case was followed by Sharpless v. Mayor of Philadelphia. The Court held: "If an act of the Legislature be within the general grant of power, and not expressly forbidden by the State or Federal Constitution, it is valid. To make it void, it must be clearly not an exercise of legislative authority, or else forbidden so plainly as to leave the case free from all doubt. An act of Assembly of this nature is not a violation of any of the various provisions of the Constitution in relation to the protection of property, taking private property for public use, taxation, or eminent domain. Taxation is a legislative right and duty, and the power of the Assembly therein is limited only by its discretion. For the abuse of it, the members are liable to their constituents. Sharpless v. Mayor, &c., 21 Pa. State, 147.

This case was to build a railroad not terminating in or at the city, and in part beyond the limits of the State.

The same principle was held in Moore v. City of Reading, 21 Pa. State, 188, and adhered to in Commonwealth v. Com. of Allegany, 32 Pa. State.

The question was decided in the same way in Ohio, in 1851, in Griffith v. Crawford, 20 Ohio, 609, where it was held, as in Iowa and elsewhere, that a prohibition against creating a debt by a State, does not apply to a county or city.

Hitchcock, in his opinion, page 20 of Appendix, quoting from 11 Pa., says: "Of late years it has become the fashion to impeach the action of legislative bodies as unconstitutional, where it happens not to accord with the party's notion of abstract right. This is done in sheer oblivion of the doctrine that express prohibition or necessary implication is necessary to oust legislative authority. Where the prohibition is not found in the primordial law, the exertion of the power cannot be deemed unconstitutional, though it seems to trespass upon our ideas of natural justice and right reason." 20 Ohio, Appendix 20.

The question was again decided in the same way in the follow-

ing cases in Ohio: C., U. & Z. R. R. v. Clinton Co., 1 Ohio State, 77; S. & J. R. R. v. Trustees North S., 1 Ohio State, 102; Cass v. Dillon, 2 Ohio State, 607; State v. Vanhorn, 7 Ohio State, 301; State v. Union T. Trustees, 8 Ohio State, 401.

In Alabama, 1854, the Court held, that "a law authorizing cities to take stock in railroads running beyond their limits, was Constitutional. The power of taxation extends to all appliances which are ordinarily adopted or may be calculated to develop the resources of the State, such as providing outlets for commerce, improving the social, moral and physical condition of the people. The power of levying taxes pertains to the legislative department, which must determine, subject to the Constitutional limit, the objects for which, and the manner in which, they must be levied, they being responsible to their constituents for the exercise of the power." Stein v. Mayor of Mobile, 24 Ala., 591.

The same principle has been decided in North Carolina, in 1854. Taylor v. Newbern, 2 Jones' Equity, 141.

In Louisiana, in 1853. Police force v. Succession of McDonough, 8 Lou. An., 341; V. S. & T. R. Cor. v. of Paris Ouachita, 11 Lou. An., 649; Parker v. Scogin, 11 Lou. An., 119.

In Missouri. St. Louis v. Alexander, 23 Missouri, 483.

Redfield, page 534 in the notes to his treatise, says, the question was decided in Mississippi, Strickland v. Miss. R., 21 Miss., 209, but I cannot find the case.

Such bonds were held Constitutional in South Carolina. Copes v. City of Charleston, 10 Richardson, 491.

In 1857, this question was before the Supreme Court of Indiana, and that Court, with its usual brevity and force, placed the Constitutional power of the Legislature upon arguments which are unanswerable. "The question therefore presents itself," 9 Indiana, 79, "can the power of issuing bonds to aid in building a railroad" be given to a city? Of the capacity to confer it, we have not given an opinion. That is now the question. We have seen that no express Constitutional provision stands in the way of granting such power to a city, as we hold that the prohibition in the Constitution upon the Legislature to create a State debt,

does not prohibit that body from authorizing cities to create debts.

"This is our construction of the language of the Constitution. But it is insisted, that the power is not a legitimate part of the authority of a municipal corporation—that it is outside of the purpose for which such corporations are created, and that this is a sufficient reason for holding them incompetent to receive a grant of such power. But is not this begging the very question to be decided? For what precise purposes are municipal corporations created? How much power, and no more nor no less, is embraced by the idea of a municipal corporation? We have not been satisfactorily enlightened on this point. If the Legislature can confer a little legislative power upon a city for local objects, can it not confer a greater amount for the same objects? It would hardly be said that cities were created simply to establish and enforce police regulations—to maintain order amongst the citizens. By common custom, they establish sanitary regulations, rules governing markets, &c.; and on what principle do they exercise these powers? They go further, they construct streets, sidewalks, bridges, &c., within their limits. They do more. They build wharves to accommodate their trade and commerce coming to them from a distance; they construct water works—going for the purpose miles beyond their corporate limits. They construct works for lighting, &c. These, and other like powers, though not existing in every one, yet, we believe, all concede may be conferred upon municipal corporations as legitimate, as Constitutional, though in their exercise the citizens are not severally equally benefitted in proportion to taxes paid. See Lafayette v. Cox, 5 Ind. R., 38. Now, if a city may build wharves, or take stock in companies created to build them, to foster commerce—may take stock in companies chartered to furnish the people with water, light, &c.,—why, as a question of power, may it not take stock in companies for the making of highways to facilitate the bringing in of bread and meat and fuel to the citizens? Are not these of nearly as much importance to them as water, light, &c.? And are not such works, in a special manner, locally advantageous

to the city? And where the citizens of a place have seen fit to ask, and the Legislature to grant such power, and the citizens have subsequently, in the prescribed mode, exercised it, no Constitutional provision forbidding, a Court, whose province is simply to decide what the law is, not what it should be, cannot annul such exercise of power. How much local benefit must an improvement confer to bring it within the spirit of a local one? If a city may build a wharf to accommodate its commerce, may it not, also, a depot? May it not build the track of a road through its corporate limits? May it not, then, put in that amount of stock or bonds to pay the company the sum the depot and track would cost?

"The practical application of the power of cities must necessarily change with the progress of science and invention. Before the uses of gas were known, cities did not erect gas works.

"Let it be observed, that while we think we cannot hold it unconstitutional for a city to aid in the construction of a highway, a legitimate public undertaking, and one which promotes the convenience of all the citizens by facilitating the introduction among them of fuel, bread, &c., thus conferring a local benefit—we mean in no manner to be understood that a city could engage in trade and traffic in those articles. Such pursuits belong to the individual citizens and private corporations. See Beebe v. The State, 6 Ind. R., 501.

"And for a city to traffic in stocks or bonds owned by third persons, might be regarded as such private pursuit. The investment by the city must be in aid of the public undertaking, a legitimate object of pursuit by a government.

"This distinction is important, and should be borne in mind. It is sometimes said, that by taking stock, or otherwise aiding a railroad, a city compels her citizens to invest their property in a partnership operation against their will. It is in some sense true. So she does when she takes stock in, or otherwise aids, a gas or a water works company. So does the State thus compel her citizens, in the same sense, to invest their means in a partnership with her when she constructs a railroad or canal. The citizen's money

is taken by taxation and invested in the work, and his dividends, his profits, come back in the tolls, rents, &c., paid into the State treasury. So also, in city investments, through the city treasury. But these are public undertakings of a governmental character. When prosecuted by State taxation, the citizen consents to them through his representative in the State Legislature. When by city taxation, the citizen consents by his more immediate representative in the city Legislature.

"And, beyond doubt, general powers of government, for local interests, may be exercised as equitably by a city as by a State administration.

"It will also be noticed, that we have thus far treated the power conferred upon cities to enact ordinances, levy and collect taxes, &c., as a delegated legislative power. If it be such, then legislative power may be delegated, and the extent to which it may be done in particular cases, must depend upon the Legislature, if the Constitution is silent upon the subject, the grant being subject, of course, to the Constitutional limitations upon the legislative power of the State. See, on this point, Am. L. Reg., p. 289; Clarke v. The City of Rochester, 5 Am. L. Reg., 289. But if the above named power of cities is not legislative, and legislative power cannot be delegated, then this immemorially exercised power of taxing, &c., is some other nameless power conferred by the Legislature, and, for aught we are able to discover, may as properly be exercised for paying for stock in a railroad running to or through a given city, whereby a channel is opened for bringing coal, flour, &c., to it, as for paying for stock in a company to bring water to the city. It is true, the water works may benefit nobody but the citizens of the city, while the railroad may benefit the surrounding country, to some extent, at the same time that it confers a great local benefit on the city—one, perhaps, greater than the water works. But when such is the case, should the city be deprived of the right to benefit itself locally, because it cannot do so without also benefiting others?

"And if the argument is a good one, that cities are necessarily incapable of aiding any improvement that may extend beyond the

corporate limits, will it not apply with equal force to States? May it not be said that a State is created to govern within its territorial limits, and hence, that it is unconstitutional for it to aid any work extending beyond those limits? That Indiana, therefore, could not aid in the construction of the Wabash and Erie canal, because it extended into Ohio? that she could not, with the consent of Ohio, construct that portion of the White Water canal lying in that State, because it was without her territorial limits? that South Carolina could not aid in the construction of a railaoad to Memphis, in Tennessee, or to New Orleans, in Louisiana? But is this the doctrine? A State can do what its Constitution does not by positive provision, or reasonable implication, prohibit.

"The United States and city corporations can do only what their Constitutions permit. If the Constitution of the United States expressly authorized the government to construct, with the consent of the States, roads within their limits, would there be any doubt of her power to do so? If a State, then, can construct by permission, if South Carolina can, with the consent of Tennessee, construct a road in that State—cannot a city of a State be authorized by the State to take stock in a road extending beyond her corporate limits? We think the proposition may be asserted, that one government may act within the territorial limits of another, with the consent of the latter.

"Another objection must here be noticed, though not presented by counsel. It has been suggested, that taxation to pay the city indebtedness sued upon, is the taking of private property for public use; and the suggestion is true. And it is the important fact in the case which renders the taking legal. Property may be taken, through the taxing power, for public use, without any other compensation than the common benefit which the appropriation and expenditure of the proceeds of the tax produce. It is only the taking of specific pieces of the property of an individual, by virtue of the right of eminent domain, that is prohibited by the Constitution, without special compensation. See the distinction touching this subject clearly drawn in The People v. The Mayor, &c., of Brooklyn, 4 Comst., 419. But suppose the collection of a tax for the purpose mentioned, the tax-payers not consenting, would be an unconstitutional taking of private property—who

should complain of it? There is nothing in the record showing us that any citizen of Aurora objects to his property being or having been so taken; that every one is not acquiescing, consenting; that they have not all of them stood by and seen the subscription made, bonds issued, and money expended by the company, on the faith of these acts. May they not bind themselves—be estopped by such acts? See the State *ex rel.*, &c., v. Sickler, at this term. With one member of the Court, these considerations have weighed in the decision of the cause."

THE QUESTION IN THE FEDERAL COURTS.

Such bonds were held constitutional in Clay v. Nott, U. S. Circuit Court for Maine, cited by Redfield on Railways; Aspinwall v. Knox co., Indiana C. C. by McLean, and when the same case was before this Court the constitutional question was not even mooted. Such bonds were held valid in Mygatt v. City of Green Bay, 8 Law Register 271.

Before this Court, the question has been incidentally decided. Aspinwall v. Knox co., 21 Howard, 539; Zabriskie v. C. C. & C. RR., 23 Howard, 381; and directly decided in Curtis v. County of Butler, 24 Howard, 447, 449.

The opinions of this Court, upon another branch of this case, are conclusive in favor of the validity of these bonds.

From the year 1853 to the year 1862, the Supreme Court of Iowa held, that section 114 of the Code of Iowa authorized the issue of such bonds, and that their issue was in compliance with the Constitution. In Clapp v. The County of Cedar, 5 Iowa, 46, 47, Woodward, J., reciting the former decisions of the Courts, the Acts of 1854–'5, pages 190, 219:

"But this is a subject in which change is disastrous. It is one in which we are bound by former decisions. Such an one has been made, and the world has acted on it. To change now would be the worst of all repudiation—judicial repudiation. The first decision on a subject of this nature, by the highest judicial tribunal of a State, at a time when the business of a country is moving on, is final. It determines the policy of the State. It is

impossible to recede. The world waits and listens for judicial determination, and then acts accordingly; and in this case it has acted with vigor." Page 46. "Now, when these decisions and this legislation are regarded, does any lawyer expect this Court to overturn all that has been done on the faith of them, whatever our individual opinions may be? We think not."

In 1859, McMillen v. Boyles, County Judge of Lee Co., 6 Iowa, 391, Wright, Justice, who dissented from Clapp v. Cedar Co. held "the question of the power of the County Judge to submit such questions to the people, must be regarded as settled." In that case, the suit was before the bonds were issued, and there is a suit now on the way here on those very bonds, which the purchaser took on the faith of the opinion in that particular case; and those same bonds issued on the faith of that decision held invalid in 1862.

In seven different cases from '53 to '62, the Supreme Court of Iowa has held such bonds constitutional, and after millions of dollars have been invested in them by *bona fide* purchasers on the faith of these decisions, this Court is called upon to follow a repudiating judicial opinion, because it is an interpretation of the Constitution of the State.

The answer of this Court to such a proposal is already made. We understand the universal ruling of this Court to be, that where a State Court has put a construction upon its Constitution, holding the validity of contracts, and afterwards repudiates, that this Court follows the first interpretation. This was the case in State Bank of Ohio v. Knoss, 16 Howard, 369. The Court say, page 391, "The established construction of a statute of the State is received as part of the statute." Page 391. "To follow the construction of a State Court, in such a case, would be to surrender one of the most important provisions of the federal Constitution." Page 392.

In 1 Black, 436, this Court says, it is a general rule that the constructions given by State courts to State laws and constitutions are binding and conclusive upon the Federal courts; but the rule does not extend to cases in which this Court is called upon to in-

terpret the contracts of States, though they have been made in the form of laws, or by functionaries of the State in pursuance of State laws. Fidelity to the Constitution makes it necessary that in such a matter this Court should not follow the construction of a State court, with whose opinions it cannot concur; and it makes no difference whether the contract is in the shape of a law, or a covenant by the State's agents." Jefferson Branch Bank v. Skelly, 1 Black, 436.

MORAL ASPECT OF THE QUESTION.

We have now presented the judgment of the highest judicial tribunals of fifteen States of the Union, of three Circuit Courts, and incidentally of the Supreme Court of the United States. If ever a Constitutional question can be regarded as settled, this question should be so regarded.

"It has received the sanction of the executive, judicial, and legislative departments of the Government, of the officers and people of the counties and cities interested. If the Constitution has been violated, it has been done by the combined act of the government and the people interested in the question. It is therefore a mistake of the people, as well as of their functionaries, as to the meaning of their own frame of government, and the question arises, who shall bear the consequences of that mistake? they who made it, or those whom they induced to trust in them—they who actually or tacitly set aside or misunderstood their own Constitutional principles of social authority, or the stranger, who trusted that the united conduct of the people and all their officers was a safe exponent of their principles?

"No man of any tolerable morality will say, that those who made the mistake may cast the loss upon those who trusted them, as understanding their own business, their own authority, Constitution and laws.

"There is not a man in the country, who did not know that these bonds were about to be issued. All knew that the public faith was to be pledged to these transactions. They knew it as a

question, whether a tax of higher rate than that provided by law shall be levied; and in all cases when an additional tax is laid in pursuance of a vote of the people of any county, for the special purpose of repaying borrowed money, or of constructing or aiding to construct any road or bridge, such special tax shall be paid in money, and in no other manner.

SEC. 115. The mode of submitting such question to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation, if there be one, is to be published at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication is to be made by being posted up in at least one of the most public places in each township in the county, and in all such cases in at least five among the most public places in the county, including the above, and one of them in all cases at the door of the Court House, during at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of the election.

SEC. 116. When a question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof in addition to the usual taxes, as directed in the following Section, and no vote adopting the question will be of effect unless it adopt the tax also.

SEC. 117. The rate of the tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings, as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years. When the object is to construct or aid in constructing any road or bridge, the annual rate shall not be less than one mill on a dollar of the valuation, and any of the

above taxes becoming delinquent shall draw the same interest with the ordinary taxes.

SEC. 118. When it is supposed that the levy of one year will not pay the entire amount, the proposition and vote must be to continue the proposed rate from year to year until the amount is paid.

SEC. 119. The County Judge, on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the proposition and the result of the vote to be entered at large in the minute book, and a notice of its adoption to be published for the same time and in the same manner as above provided for publishing the preliminary notice, and from the time of entering the result of the vote in relation to borrowing or expending money, and from the completion of the notice of its adoption, in the case of a local or police regulation, the vote and the entry thereof on the county records, shall have the force and effect of an act of the General Assembly.

SEC. 120. Propositions thus adopted, and local regulations thus established, may be rescinded in like manner and upon like notice by a subsequent vote taken thereon, but neither contracts made under them, nor the taxes appointed for carrying them into effect, can be rescinded.

SEC. 121. The judge shall submit the question of the adoption or rescision of such a measure when petitioned therefor by one fourth of the voters of the county.

SEC. 122. The record of the adoption or rescision of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted.

SEC. 670. The city charter may also confer power upon the city authorities to open new streets and discontinue old ones, and to dispose of the ground thus rendered unnecessary to the public; to compel the owners of land within the city limits to drain or fill up ponds or stagnant places thereon, and prescribe the manner of doing the same; to borrow money on the credit of the city, but not without a direct vote of the people in favor of such loan; and on the application of the owners of three-fourths of any square to prohibit the erection of any except brick or stone buildings

within that square; and generally to make any regulations of a like nature with those above authorized, for the order and good government of the city, and the welfare of the inhabitants, not in conflict with the laws of the State.

The following is from the acts of Iowa, 1854–'5, page 192:

CHAP. 128.— *An Act Regulating the Interest on City and County Bonds.*

SEC. 1. *Be it enacted by the General Assembly of the State of Iowa*, That it shall be competent and lawful for every Railway Company, organized under the laws of this State, to issue its bonds, to secure the payment of money borrowed for construction or equipment, at such rate of interest as it may deem expedient, and may sell the same at such discount as may be necessary, and such bonds shall be legal and binding.

SEC. 2. That whenever any company shall have received, or may hereafter receive, the bonds of any city or county, upon subscription of stock by such city or county, such bonds may bear interest at any rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient.

SEC. 3. The provisions of this act shall apply to any railroad bonds which have been heretofore issued, as well as to those that may hereafter be issued.

Approved, January 25th, 1855.

The following is from Chap. 149, Acts of 1854–'5, page 219:

COUNTY AND CORPORATE BONDS.

An Act Regulating the Issue of County and Corporate Bonds.

SEC. 1, *Be it enacted, &c.*, That in all cases where county or city or town incorporations have, or may hereafter, become stockholders in railroads or other private companies or incorporations, it shall not be lawful for the County Judges, Mayors, or other agents of such cities or counties, to issue the bonds of their counties or

cities, until they are satisfied that the contemplated improvement will be constructed to or through their respective cities or counties within thirty-six months from the issuing and delivery of said bonds; and the proceeds of such bonds shall in all cases be expended within the limits of the county in which said city is situated; *provided*, that nothing in this act shall in any way affect corporation rights for any contracts or subscriptions heretofore made with any railroad company or corporation, for the issuing of county or corporation bonds.